**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION SEVEN**

SPECTRUM JUVENILE JUSTICE SERVICES

Respondent

and

Case 07-CA-155494

TAMIKA KELLEY, an Individual

Charging Party Kelley

and

Case 07-CA-160938

COUNCIL 25, MICHIGAN AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES (AFSCME), AFL-CIO

Charging Party AFSCME

and

Case 07-CA-174758

INTERNATIONAL UNION, SECURITY, POLICE AND FIRE PROFESSIONALS OF AMERICA (SPFPA)

Charging Party SPFPA

and

Case 07-CA-175342

LOCAL 120, INTERNATIONAL UNION, SECURITY, POLICE AND FIRE PROFESSIONALS OF AMERICA (SPFPA)

Charging Party Local 120

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**REPLY BRIEF IN RESPONSE TO COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPITIONS TO ALJ DECISION**

Respondent, Spectrum Juvenile Justice Services ("SJJS" or "Respondent"), submits this Reply Brief in support of its Exceptions to the Administrative Law Judge's ("ALJ") Decision and in reply to the General Counsel's Answering Brief to Respondent's Exceptions to ALJ's Decision ("the GC Brief"). This Brief is timely filed pursuant to 29 C.F.R. 102.46(e) that provides "within 14 days from the last date on which an answering brief may be filed pursuant to paragraphs (b) or (d) of this section, any party may file a reply brief to any such answering brief." Pursuant to the Order Denying General Counsel's Motion for Leave to Exceed 50-Page Limit, and ordering that General Counsel submit a conforming Answering Brief by close of business on September 27, 2018, Respondent's Reply Brief is due October 11, 2018.

## A. The General Counsel Ignores the Severity of Neely's Actions and Does Not Contest the Fact that the ALJ Substituted His Business Judgment for that of SJJS

As it relates to the termination of Alfred Neely (GC Brief, pp 13-14), the GG Brief distorts the severity of Alfred Neely's actions. He gives no consideration to the facts that: (1) SJJS is a maximum security jail, (2) Neely admitted knowing that he was alone with 11 dangerous felons for over five minutes and did not call for support; (3) Neely admitted to being out-of-ratio, (4) Neely had been trained on ratio requirements and his obligation to notify his supervisors of any ratio violation, (5) Neely's conduct endangered the safety of himself, the female teacher, as well as the residents, (6) Neely's ratio rule violation caused SJJS to violate a State Licensing Rule, and (7) Neely had a prior violation for failure to maintain ratio after leaving his assigned post without relief (for which he received a three day disciplinary suspension and a warning that further violation may result in discharge). (Respondent's Brief, pp 11-18).

Further, the General Counsel does not argue, and the ALJ did not find that Neely was treated dissimilarly from any other employee who violated ratio and/or reporting policies or licensing requirements.

Lastly, the General Counsel does not contest Respondent's Exception based on the fact that the ALJ improperly substituted his business judgment on how to maintain a safe maximum security jail for that of SJJS. The ALJ's exoneration of Neely, in light of the seven facts summarized above, can only have resulted from *his* business judgment that the ratio and licensing rules were overly restrictive or should be ignored – it's not the way the ALJ would run a prison. But, it is the way that the State of Michigan Licensing and SJJS operate.

**B. The General Counsel Does Not Contest the Fact that the ALJ Substituted His Business Judgment for that of SJJS In Regard to the Termination of Simpson**

As it relates to the termination of Lamont Simpson the ALJ found, and the GC Brief echoed, an untruthful assertion that "other employees who missed mandation more than once were not discharged." (GC Brief, p36-37). Both the ALJ and the General Counsel intently ignore the business records that show otherwise. The similarly situated employees identified by the ALJ and General Counsel are Jason Prichard, Marshawn Mackie, and Darnesha Coy. However, as set forth at page 32 of Respondent's Brief, none of these previous employees were similarly situated to Simpson. Other employees who were similarly-situated to Simpson (as set forth on Respondent's Exhibit #12) are records of employees that refused or walked off mandation from the date of the rally through the date of the hearing. Exhibit #12 shows that Marshawn Mackie, Linda Boone, Adrienne Miller and Quiana Jenkins were all terminated for walking off mandation following a second infraction – exactly like Simpson was. And, the General Counsel does not assert and the ALJ

did not find that SJJS knew of Mackie's, Boone's, Miller's or Jenkins' participation in concerted protected activities.

The General Counsel does not contest Respondent's Exception based on the fact that the ALJ improperly substituted his business judgment for the decision of SJJS as to whether SJJS *should* make an exception for mandation for employees who *tell* a manager that they cannot take mandation because of other commitments or asked not to be mandated in such a way as to interfere with other employment. Clearly, the ALJ thinks (if he were running a jail) is that he would have such a policy. But he does not get to substitute his business decision for that of SJJS. (*See* Respondent's Brief, pp 15-16, 26-27). There is absolutely nothing in the record that supports a conclusion that SJJS made exceptions for mandation for a excuse of having another job or because of child care issues. In fact, just the opposite is true.

Quiana Jenkins was hired by SJJS on August 10, 2015 (TR- 212); a date 35 days after the rally. There is no evidence in the record to support a contention that she was engaged in concerted protected activity or that SJJS knew of any support she may or may not have had for the union. Ms. Jenkins was mandated to work a shift on May 6, 2016. (GC 8 and 9; TR 224-226). She testified that she could not work because she had to pick up her children. (TR 224-225; GC Ex. 8). This was her first refusal to work a mandated shift. (GC Exh. 8 and 9). On May 27, 2016, Jenkins refused mandation for a second time. Once again, Jenkins called her supervisor and explained to him that she could not stay because she had to pick-up her children (TR 226-227). Regardless of whether Jenkins had child-care issues or not, Jenkins was terminated for her second refusal of mandation. (TR 228- 232; RX 12, p 24)

The ALJ erred in substituting his business judgment that SJJS should excuse employees who claim to have other job responsibilities and/or who have child care issues from mandation. That's how the ALJ would run a maximum security prison if he was making the policy. However, because of the need to assure adequate staffing in the face of absenteeism, to maintain the level of coverage mandated by the State of Michigan, SJJS does not have a policy of allowing employees who have other commitments to be excused from mandation.

### C. Both the General Counsel and ALJ Mischaracterize the Testimony and Exhibits Establishing that Respondent Mandated Contingents Prior to the Union Election

The ALJ found that on or about June 1, 2016, contingent employee Jenkins was terminated for refusing to work mandatory overtime; and, since the employer implemented the practice of mandating contingent workers without providing notice to or allowing the SPFPA to bargain with Respondent, that Jenkins' discharge was in violation Section 8(a)(1) and (5) of the Act. The ALJ also found that the change in policy was motivated by unlawful considerations and was a violation of 8(a)(3) (Decision, p. 52, 55). The ALJ erred in making both of these findings. He did this by disregarding Respondent's business records and revising testimony. The General Counsel echoed this artifice in the GC Brief.

> The fabrication is at GC Brief, p. 40.
>
> Respondent presented records showing that contingents had worked overtime prior to the election. However, the ALJ did not give that evidence any weight because Respondent admitted that contingent employees had volunteered for overtime and it could not, based on those records distinguish those employees who were mandated and those employees who volunteered for overtime.

*Any,* impartial review of the testimony and records shows that the testimony about the business records was critically misrepresented. First, as explained at pages 35 - 38 of Respondent's Brief in Support of Exceptions, the ALJ first ignored the obvious – employees who "volunteer" are not "mandated." Then, he concludes that where the records show an employee was "mandated," it was possible he volunteered, basing that conclusion on the testimony of Human Resource Administrator James Wiser ("Wiser"). However, Wiser's testimony has been seriously misconstrued. Wiser explained the records showed that the employees had been "mandated." The records would have said "volunteered" if they volunteered.

According to the ALJ, Wiser acknowledged that the "contingent employees could have volunteered to work those mandated shifts, which was not noted on those documents." The testimony that the ALJ relies upon is at TR-737-38 and *addresses how a volunteer* would be indicated on business records:

> Q. Okay. Thank You. Turning your attention, sir, to R—what's been marked as Respondent's Exhibit 17. Do you have that in front of you, sir?
>
> A. Yes.
>
> Q. Now, with regard to all of these documents, how would it be noted on these documents that a contingent employee *volunteered* to work a mandated shift. How would it be noted on these documents?
>
> A. It wouldn't be noted on a status change. If the supervisor did it properly, it would be on the timecards.
>
> Q. Okay.
>
> A. Under the raw notes. They put a note in. They're suppose to put a note.
>
> Q. Okay. If the supervisor didn't do it properly –

ALJ RANDAZZO: I'm sorry, I don't – I'm sorry. *I don't see anything about voluntarily.* Am I –

WITNESS: There isn't one on this page.

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WITNESS: So, the supervisor should indicate that on their time card, putting a note in. They didn't in this case …

ALJ: Okay, okay.

WITNESS: -- but that's how they would do it.

Contrary to the ALJ's misstatement, Wiser did not testify that the contingent employees who the records indicate were "mandated" might have volunteered. Instead, he testified that if the contingent employee "volunteered" it would be noted on the time card. Respondent's Exhibit 17 was not a record of volunteers, it was a record of *mandation.*

**D. The ALJ's Findings in Regard to the company's Duty to Bargain is Moot and the Remedy Proposed by the ALJ is improper**

As set forth above and in its primary Brief in Support of Exceptions, Respondent did not implement a new policy or practice of requiring contingent employees to work mandated shifts nor did it eliminate a policy or practice of providing breaks between employees' scheduled and mandated overtime shifts. Also, as set forth in the primary Brief, Respondent and the Union have been engaged in collective bargaining and have reached tentative agreements on both the issues of mandation of contingents and breaks. If the parties ultimately enter into a collective bargaining agreement, ordering the Respondent to "rescind the policy/practice of requiring part-time contingent employees to work mandated overtime shifts, and reinstate the policy/practice of providing breaks between employees' scheduled and mandated overtime shifts" (Order, p. 63) is improper. See, *The*

*Ruprecht Company and UNITE HERE,* 366 NLRB No. 179. Instead, if any Order is issued, pursuant to current Board law, the appropriate remedy is to order that, at the request of the Union, the Respondent negotiate over those terms.

## CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Board reverse the ALJ's Decision and dismiss the Complaint in its entirety.

Respectfully submitted,

BERRY MOORMAN, P.C.

Date: July 10, 2018

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